IN THE HIGH COURT OF JUDICATURE AT BOMBAY

T. & I. J.

NOTICE OF MOTION NO. 2575 OF 2004

IN

TEST. PETITION NO.618 OF 1995

Amrutlal Chandulal
Bhagat .... Plaintiff.

vs.

Shailesh Kanubhai Shah
Constituted Attorney of
Mrs. Mayura B. Lekinwala .... Defendant.

And

Bharat Amrutlal Bhagat .. Applicant.

And

Arjun Amrutlal Bhagat
& Anr. .. Respondents.

Mr. S. Shah with R.A. Shah, i/by M. Hiralal &
Co. for the applicant.
Mr. M.P. Shukla for Defendant.

CORAM : S.U. KAMDAR, J.
DATE : 10th August, 2005.

P.C.

. Delay condoned. Order dated 25.6.2003 in

Chamber Summons No. 1193 of 2002 has been obtained admittedly by the plaintiff without giving notice to the applicant herein. The applicant was not served according to the plaintiff a citation was not served on the ground that the applicant had given a consent to obtain the probate of the will. Admittedly the will provides for two properties which are at item 16 and 17 of Schedule I before the same being amended.

2. It is the case of the applicant that under the will one half of the said property being flat NO. 111, 11th floor of Building EL-CID situate at 314, Ridge Road, Mumbai 400 001 comes to his share. It is the case of the applicant that he gave the consent on the basis of the fact that probate was sought to be applied for in respect of the will as it stands. However, the petitioner herein has after the filing of the petition taken out a chamber summons for alteration of the said schedule by seeking to delete the properties including the property which is prescribed hereinabove which admittedly and squarely affects the rights of the applicant herein. However, the said orders are obtained of deleting the said items from the schedule without giving notice of any nature whatsoever to the applicant herein. In the aforesaid circumstances, the present notice of motion for setting aside the said order dated

26.6.2003 has been taken out. The learned counsel for the petitioners states that there was no need to give notice to the applicant because the applicant has consented to the said will being probated and accordingly, the petition was filed.

3. Thus, I grant the said notice of motion and by consent of the parties placed the chamber summons No. 1193 of 2002 on board and called out. I have heard the parties on the said chamber summons.

4. It is the case of the plaintiff that the property never belonged to the deceased and has been wrongly inserted in the will and n fact the petitioner is the owner of the same. In my opinion, that the applicant cannot determine his own title in respect of the property and by effectively deleting the said items from the schedule in fact after the will of the deceased. If the will is sought to be probated then it will have to be probated as it stands and according to the terms of the said will and the petitioner cannot apply for probate as an executor by claiming adverse interest to the deceased. I am of the further opinion that the petitioner cannot seek the probate of the will and alter the petition in such a manner that part of the property in the will can be deleted. In the aforesaid circumstances, the chamber summons taken out for amendment of the Schedule I by the

petitioner is dismissed. If the petitioner has carried out amendment to the said Schedule I then in that event the petitioner is directed to reconstruct the petition by reinserting the said property in the schedule. Such amendment to be carried out within two weeks. In so far as prayer clause (c) is concerned, the learned advocate for the petitioner states that she has no submission to make and in view thereof, the prayer clause (c) is granted. In my opinion, the executor cannot act in such a manner where he is seeking to obtain the probate of the will but at the same time alter the terms of the will by deleting the properties which are mentioned in the said probate. The petitioner having claimed an adverse interest to that of the deceased he is not entitled to continue as an executor.

5. The learned advocate applies for stay of the order. Application rejected.

6. The notice of motion as well as the chamber summons No. 1193 of 2002 are disposed of accordingly. However, there shall be no order as to costs.